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Interest to enforce Real Burdens: how material is “material”?

To enforce a real burden it has always been necessary to have interest as well as title. But under the former law the issue was rarely a live one, because burdens were typically enforced by feudal superiors, whose interest was presumed and virtually impossible to rebut.¹ That has now changed. Section 8 of the Title Conditions (Scotland) Act 2003 provides that: “A real burden is enforceable by any person who has both title and interest to enforce it”; and a person has such interest, in the normal case, if and only if

in the circumstances of any case, failure to comply with the real burden is resulting in, or will result in, material detriment to the value or enjoyment of the person’s ownership of, or right in, the benefited property.

This provision allows for two possibilities: there must be material detriment either to the value of the benefited property, or to its enjoyment. And in both cases the guardian against inappropriate enforcement is the word “material”. Only detriment which is “material” will justify enforcement. Anything less must be endured with the fortitude which is to be expected of a good neighbour.

But how material is “material”? The word itself does not carry a single and precise meaning. The *Oxford English Dictionary* offers “of serious or substantial import” but also, more weakly, “significant” and “of consequence”.² On one view, “material” is simply the opposite of “immaterial”,³ but this does little to advance matters, merely shifting the uncertainty of meaning from one word to another. An alternative, but perhaps no more helpful, approach is to say that there is an undistributed middle between “material” and “immaterial” leading to a tripartite classification of (i) material (ii) immaterial and (iii) neither material nor immaterial. In the absence of precise meaning, context is naturally of particular importance, so that the question is not what “material” means in the abstract but rather what it means in the context in which it appears in the Title Conditions Act.

A. BARKER v LEWIS

The meaning of “material detriment” in section 8 has now been the subject of judicial decision. *Barker v Lewis*⁴ concerned a recent development of five houses at Cauldside Farm Steadings, about two miles from St Andrews. Access was by a private road. The development was regulated by a deed of conditions which, among other restrictions, limited the use of each house to “a domestic dwellinghouse with relative offices only

1 K G C Reid, *The Law of Property in Scotland* (1996) para 408.

2 The online version of the *Oxford English Dictionary* was consulted. This is a revised and updated version of the second edition of 1989.

3 As was argued, unsuccessfully, by the pursuers in *Barker v Lewis* 2007 SLT (Sh Ct) 48.

4 2007 SLT (Sh Ct) 48.

and for use by one family only and for no other purpose whatsoever". The "tranquil location" promised by the developer's brochure appeared under threat when one of the owners began to use her house for a bed-and-breakfast business.⁵ Eventually, the owners of three of the other houses sought interdict. The sheriff⁶ accepted that the business was in breach of the burden in the deed of conditions, and that there was title to enforce.⁷ The question of interest, however, was seen as more difficult. It was true that life for the pursuers had been made less pleasant. The defender's business attracted around 250 visitors a year, leading to more traffic, increased noise from late arrivals and early departures, some inappropriate parking, and a general loss of privacy and peace. The disturbance was increased by the secluded nature of the development, and the fact that the houses were close together. Nevertheless, the sheriff concluded that the pursuers had failed to show interest to enforce, and interdict was refused.

On the evidence as summarised in the judgment, this was a rather unexpected result, although it was evidently a close one, with the sheriff indicating that if the number of guests were to increase in the future, "there is a real risk" of material detriment to the pursuers' enjoyment of their properties.⁸ More important, however, is the general approach which the sheriff chose to adopt. His decision may be said to have rested on three main propositions. First, "material" detriment means "substantial" detriment. Secondly, in interpreting "material" it is helpful to have regard to the law of nuisance. Thirdly, in assessing detriment arising out of non-compliance with a burden it is relevant to consider what detriment might have arisen even if there had been full compliance. While the sheriff deserves sympathy for having to grapple with these issues for the first time, there are real difficulties with the approach he chose to adopt. Taken singly, each of the propositions seems open to question, while, taken together, they present a model of interest to enforce which is unconvincing as well as damaging to the future usefulness of real burdens.

B. THE THREE PROPOSITIONS

The first proposition was that "material" means "substantial". That, said the sheriff, was the "plain meaning" of the word.⁹ But the truth is that there no "plain meaning" of "material" – as already seen – so that it is always necessary to consider the context in which it is used. In fact, the Title Conditions Act uses both "material" and "substantial", and is careful to do so in different ways. "Material" detriment is the test for interest to enforce, but when it comes to compensation for variation or discharge by the Lands Tribunal the test is "substantial" loss or disadvantage.¹⁰ The hierarchy which these words imply is obvious. Where detriment or disadvantage reaches the point of being "material", there is interest to enforce; but it is only when it is raised to the level

5 See www.millhouse-standrews.com/.

6 Sheriff G J Evans.

7 On this point the sheriff's judgment contains an interesting discussion (at 54-55) of the extent to which *Low v Scottish Amicable Building Society* 1940 SLT 295 is consistent with the decision of the First Division in *Colquhoun's CB v Glen's Tr* 1920 SC 737.

8 At 51F (finding in fact and in law 9).

9 At 55E.

10 Title Conditions (Scotland) Act 2003 s 90(7)(a).

of “substantial” that compensation is due, in the event of variation or discharge by the Tribunal. And because disadvantage is rarely “substantial”, the experience of the last 30 years is that compensation is rarely awarded.¹¹ In this connection it seems worth observing that, as originally enacted, section 20 of the Abolition of Feudal Tenure etc (Scotland) Act 2000 (which allowed the Lands Tribunal to reallocate feudal burdens in certain cases) imposed a criterion of “substantial” disadvantage, but that this was changed to “material” detriment by the Title Conditions Act.¹² The distinction can also be found in other provisions of the Title Conditions Act. For example, while section 16(1) requires “material expenditure” whose benefit has been “substantially” lost, as a condition of acquiescence, section 54(3) defines a “sheltered or retirement housing development” as one containing houses with facilities “substantially” different from those of ordinary houses.

The second proposition linked interest to enforce to nuisance. The result, according to the sheriff,¹³ would be that

in order to find that the disputed activity of the burdened proprietor has resulted, or will result, in material detriment to the enjoyment of the benefited property, the court must be satisfied that the result has been, or will be, more than just sentimental, speculative, trivial discomfort or personal annoyance and that it amounts to substantial inconvenience or annoyance, as judged by the objective standard of what would affect a proprietor of ordinary sensibility and susceptibility and taking into account both the existing character of the locality affected and the extent to which the benefited and the burdened properties are geographically interconnected.

These words are drawn from the law of nuisance and, in part, are a direct quote from the speech of the Earl of Selborne in one of the leading Victorian cases.¹⁴ The linkage, however, is problematic. For on the one hand, if the test for interest to enforce is the same as the test for nuisance, real burdens would be superfluous in respect of matters which would in any event be governed by nuisance. Conveyancers would have been wasting their time in putting real burdens into deeds. But on the other hand, if the test is different, as appears to be the case, then the linkage is unhelpful and misleading. The leading modern account of nuisance lists materiality as only one of the six factors which may be relevant in order to determine whether a nuisance has occurred.¹⁵

There are other objections as well. There is nothing in the Act, or in the report which lies behind it,¹⁶ to warrant recourse to the law of nuisance. Nor is it evident why a doctrine of the common law should be thought of as being of assistance in a matter of statutory interpretation. Finally, the suggested linkage tells us nothing about

11 Sir Crispin Agnew of Lochnaw, *Variation and Discharge of Land Obligations* (1999) ch 7. The experience under the Title Conditions Act has been the same: see *J & L Leisure Ltd v Shaw*, 28 March and 25 August 2006, Lands Tribunal; *West Coast Property Developments Ltd v Clarke* 28 June 2006, Lands Tribunal.

12 Title Conditions (Scotland) Act 2003 Sch 13 para 4, amending s 20(7)(a) of the 2000 Act.

13 At 55H.

14 *Fleming v Hislop* (1886) 13 R (HL) 43 at 45.

15 N R Whitty, “Nuisance”, in *The Laws of Scotland: Stair Memorial Encyclopaedia*, Reissue (2001) para 43. Surprisingly, this work is not referred to by the sheriff in *Barker v Lewis*.

16 Scottish Law Commission, Report on *Real Burdens* (Scot Law Com No 181 (2000); available on www.scotlawcom.gov.uk) paras 4.16-4.24.

the meaning of “material” in the many cases where the content of the burden has no parallel in the law nuisance – for example, in the standard case of a prohibition on building.

The sheriff’s third proposition has a certain intuitive attractiveness. Evidently, the disturbance caused by the prohibited use (as a B & B) was no worse than might be caused by other use which would be freely permitted under the titles (e.g. use by a large family). “On a change of ownership”, the sheriff pointed out, the pursuers “might end up with a nose, intrusive neighbour with a large family who all possess peculiar noisy habits and hobbies”.¹⁷ The reasoning, however, is flawed. The risk of a noisy family is one which, under the titles, the pursuers are bound to take. But they are not bound to take the risk of noisy guests in a B & B.

C. CONCLUSION

Each proposition in *Barker v Lewis* raises the bar for interest to enforce; cumulatively, they raise the bar too high. Although authority under the former law was meagre and not always easily reconciled, there was little doubt that, for immediate neighbours at least, there was interest to enforce most burdens most of the time.¹⁸ That is as it should be, for otherwise real burdens would be largely pointless. Admittedly, section 8 provides a more exacting test than the former law,¹⁹ especially for those whose property lies at a distance.²⁰ But interest should not be treated as a mode of extinction.²¹ The task of measuring gain against pain is one for the Lands Tribunal and not for the ordinary courts.²² A person wishing to be relieved of a burden should apply to the Tribunal or make use of one of the other methods of variation and extinction which the Act provides. At least in a question with immediate neighbours, it should not normally be possible to shelter behind an absence of interest to enforce.²³

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¹⁷ At 57A.

¹⁸ Reid, *Property* (n 1) para 407.

¹⁹ R Rennie, “Real burdens – a question of interest” 2007 SLT (News) 89 at 93.

²⁰ In the Scottish Law Commission’s original version of what is now s 8, “the distance between the benefited and burdened properties” was singled out as a factor of particular importance: see Report on *Real Burdens* (n 16) para 4.18.

²¹ Any more than interpretation is a mode of extinction: see Scottish Law Commission, Report on *Real Burdens* (n 16) para 4.62. Hence s 14 of the Act.

²² Thus the Title Conditions (Scotland) Act 2003 s 100(b), (c) invites the Tribunal to compare “the extent to which the condition confers benefit on the benefited property” with “the extent to which the condition impedes enjoyment of the burdened property”. For one example among many, see *Faeley v Clark* 2006 GWD 28-626.

²³ Unless, of course, there is no detriment to the benefited property or the detriment is trivial. As the Scottish Law Commission has pointed out (Report on *Real Burdens* (n 16) para 4.17): “An obligation not to build prevents rabbit hutches as well as five-storey blocks of flats. But it seems doubtful whether there is interest to prevent the building of rabbit hutches, even on the part of an immediate neighbour”.